

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

vs.

Case No. 8:03-CR-77-T-30TBM

GHASSAN ZAYED BALLUT

**DEFENDANT GHASSAN BALLUT'S UNOPPOSED MOTION TO WAIVE
APPEARANCE AT PRETRIAL CONFERENCE AND MEMORANDUM OF LAW**

The Defendant, GHASSAN ZAYED BALLUT, by and through his undersigned counsel, hereby requests this Honorable Court to permit the Defendant to waive his appearance at the pretrial conference, oral argument, and review of juror questionnaires now scheduled on Thursday, March 3, 2005, at 1:30 p.m. and Friday, March 4, 2005, at 9:15 a.m., and as grounds therefor states:

1. The Court's Amended Scheduling Notice (Doc. 872) setting these hearing dates states, "The presence of the individual Defendants IS required at these hearings."

2. The Defendant is a resident of Tinley Park , Illinois, near Chicago.

3. The Defendant is on the Transportation Safety Administration's "no-fly" list and therefore is required to travel by surface transportation between the Chicago area and Tampa, which typically takes a minimum of two full days of travel each way and which requires substantial expense.

4. The Defendant has been advised by his undersigned counsel that the scheduled hearings will include preliminary jury selection by challenges for cause based upon information in the juror questionnaires previously received by counsel, oral argument on the motions to suppress, and other pretrial procedural matters, and that his presence has been required by the

Court.

5. The Defendant has advised his undersigned counsel that he wishes to voluntarily waive his appearance at these pretrial hearings, understanding that he will not be able to participate in these proceedings or in any decisions made on his behalf by his counsel, including decisions relating to jury selection by challenges for cause.

6. The jury trial is now scheduled to commence on Monday, April 4, 2005, at which time the jury venire will be subject to voir dire and final jury selection and impanelment will occur, and the Defendant will timely appear as required for jury trial.

7. The Defendant's undersigned counsel has contacted Assistant United States Attorney Walter Furr concerning this motion, and the Government has no objection to this motion.

WHEREFORE, the Defendant requests this Honorable Court to allow the Defendant to waive his appearance at these pretrial hearings.

Memorandum of Law

A defendant is required to be present at every trial stage, including jury impanelment. Fed. R. Crim P. 43(a)(2). A defendant is not required to be present where the proceeding involves only a conference or hearing on a question of law. Fed. R. Crim. P. 43(b)(3). The failure by a defendant to invoke his right to be present under Rule 43 at a conference which he knows is taking place concerning an issue pertaining to the jury constitutes a valid waiver of that right. United States v. Gagnon, 470 U.S. 522, 527, 105 S.Ct. 1482, 1484- 85, 84 L.Ed.2d 486 (1985). In Gagnon, due process guarantees were not violated by a district judge's in-camera meeting with a juror and lawyer for one defendant where the encounter was a short interlude in a complex trial and the defendants could have done nothing had they been at the conference and

would have gained nothing by attending. Id.

In the present case, the Defendant is mindful that challenges for cause will be raised based upon information contained in the jury questionnaires sent out in advance of this unique trial. Because of pretrial publicity, the nationality, ethnicity, and religion of the defendants, and the length and complexity of the trial, the Court labored to send out detailed juror questionnaires to a pool of 500 potential jurors as a means to cull out those for whom jury service would be a substantial hardship, those who had formed strong opinions based on public information that would affect their impartiality, and those who revealed significant bias or prejudice based on both the defendant's religion and ethnicity and recent world events. Counsel for the defendant were directed to raise such challenges for cause prior to the commencement of the trial so that the venire actually appearing for jury service at trial would be sufficiently screened and vetted to make jury selection more efficient and less subject to error and delay.

The Defendant submits that, while appreciating this effort to improve the jury selection process, his presence is not essential to this initial process of culling the venire by challenges for cause based on facts that are readily discerned from the face of the jury questionnaires. A trial court's determination of a challenge for cause against a juror is a mixed question of law and fact. Reynolds v. United States, 98 U.S. 145, 156 (1878); Spies v. Illinois, 123 U.S. 131, 179, 8 S.Ct. 22, 29 (1887). Because the facts presented in the responses on the jury questionnaires are not subject to contention and because challenges for cause at this hearing will therefore be decided largely as a question of law, the Defendant's presence is not required under Rule 43 as the hearing of challenges will involve only questions of law. Fed. R. Crim P. 43(b)(3). All other matters to be reviewed at the hearings also appear to be questions of law not requiring the

Defendant's presence.

For these reasons, the Defendant asks to be excused from appearing at the pretrial conference based on his knowing and voluntary waiver of appearance.

Respectfully submitted,

/S Bruce G. Howie

Bruce G. Howie

Florida Bar No. 263230

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Certificate of Service

I HEREBY CERTIFY that on February 28, 2005, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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